IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07/02/2004

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL No.1493 OF 1991

1.Kazhugumalai Raja (Died)
2.A.K.Rajagopalaraja ... Appellants

(The second appellant is brought on
record as LR of the deceased
sole appellant as per the order
of the Court dated 10.10.2002
made in CMP.No.3943 of 2000)

-Vs-

Rajapalayam Palayapalayam
Boopalarajaptti Illathar
Samuga Pothu Nala Fund,
Rajapalayam, by its President
Palchamy ... Respondent

Second Appeal preferred under Section 100 CPC for the relief as stated therein.

For appellants : Mr.M.V.Venkataseshan

For respondent : Mr.Azhaguraman

:JUDGMENT
The above second appeal is directed against the judgment and decree dated 20.8.1991 rendered in A.S.No.27 of 1989 by the Court of Subordinate Judge, Srivilliputtur thereby reversing the judgment and decree dated 7.4.1989 rendered in O.S.No.43 of 1985 by the Court of Additional District Munsif, Srivilliputtur.

2. On a perusal of the materials placed on record and upon hearing the learned counsel for both, it comes to be known that the respondent herein has filed the suit in O.S.No.43 of 1985 before the Court of Additional District Munsif, Srivilliputtur as against the first appellant herein praying to order eviction of the defendant from the plaint schedule premises, which is a terraced building situated in Mudangiar Road, Rajapalayam Town, and to deliver possession of it to the plaintiff.

3. The averments of the plaint are that the appellant/defendant is a tenant under the plaintiff for the suit schedule premises; that the plaintiff owns number of buildings and properties and also owns a temple by name Arunachala Eswarar Temple; that the plaintiff is carrying on the voluminuous and busy administrative business, executive and other business of its community temporarily in the Annakavadi Mandabam of the said temple; that the said Mandapam is set apart from keeping Annakavadi and for accommodating Sadhus who carry the said Annakavadi for collecting food and other articles of food; that since the temple hall is small, naturally the crowd spills over the adjoining Annakavadi Mandabam due to which the plaintiff's work is seriously disturbed and further it is unsafe to keep the records and cash of the plaintiff in the said Annakavadi Mandabam in the crowded circumstances and hence, the plaintiff, in its General Body Meeting dated 29.3.1980 resolved to take possession of the schedule property and Door No.382 which is situate in the pivotal and central place of the plaintiff's buildings and issued a lawyer's notice to the defendant and the tenant of Door No.382 on 7.3.1981 terminating the tenancy further requiring the defendant to vacate and surrender possession of the schedule property immediately on the expiry of 31.3.1981 and the defendant sent a reply dated 2.4.1981 with false and untenable contentions.

4. The plaintiff would further submit that the defendant is not prompt and regular in payment of rent and he had wilfully defaulted to pay the rents regularly; that the defendant had chosen to deposit the rents into the trial Court in pursuance of its order dated 25.8.1988 in H.R.C.A.No.11 of 1980 but the defendant had committed wilful default; that the plaintiff has no other suitable building than the schedule property and Door No.382 for its own use and occupation and one building is not enough to satisfy the requirements of the plaintiff; that the plaintiff had filed HRCA.No.13 of 1981 on the file of the Rent Controller, Srivilliputtur for eviction of the defendant and since the same was dismissed on 13.4.1982, the plaintiff filed RCA.No.16 of 1 982 on the file of the Rent Control Tribunal and the Sub Court, Srivilliputtur and the said Court, by its order dated 7.7.1984 in I.A.No.2 45 of 1984 has allowed the appeal by permitting the plaintiff to withdraw HRCA.No.13 of 1981 and to file a suit against the defendant for eviction from the plaint schedule property and hence the present suit for the relief extracted supra.

5. This suit filed by the respondent/plaintiff is stiffly opposed by te appellant/defendant by filing a written statement thereby denying all the allegations of the plaint. The defendant would further submit that he is a tenant under the plaintiff from a long time; that the plaintiff earlier filed a petitioned in HRCA.No.13/1981 before the Rent Controller, Srivilliputhur under Sections 10(2)(1) and 10(3)(b) of the Tamil Nadu Buildings (Lease and Rent Control) Act on grounds of wilful default and that the building is required for the purpose of a religious charitable education and or other public institution and since the learned Rent Controller dismissed the said petition on both the grounds, the plaintiff preferred an appeal in RCA.No.16 of 1982 before the Rent Control Appellate Authority and the Subordiante Judge, Srivilliputtur and when the said appeal was pending, the plaintiff filed an application in I.A.No.245/1984 praying to permit him to withdraw the said Appeal and the learned Subordinate Judge while permitting the plaintiff to

withdraw the said appeal has permitted him to file a 'fresh petition' on the same cause of action; that therefore the plaintiff could have filed a fresh petition only under the Tamil Nadu Buildings Lease and Rent Control Act and he cannot bring the suit on the same cause of action; that the present suit is based on the very same grounds mentioned in HRCA.No.13/1981; that even assuming, without conceding, that this suit can be filed in contravention of the order of the learned Subordinate Judge in I.A.No.245/1984, it is bad for want of proper notice under Section 106 of the Transfer of Property Act since it is admitted by the plaintiff himself that the defendant is in possession and occupation of the suit property as a tenant; that the notice alleged by the plaintiff for eviction dated 7.3.1981 was under HRCA No.13/1981 and the same cannot under law enure for the present suit; that it is now well settled that such a notice is not at all necessary for initiating proceedings under the Tamil Nadu (Buildings Lease and Rent Control) Act, 1960.

6. The defendant would further submit that there is no Annakavadi at all now in existence; that the question of wilful default was enquired into by the Rent Controller in HRCA No.13/1981 and has given a clear finding that there was no wilful default; that in fact, even after the disposal of HRCA.No.13/1981, rent is being regularly deposited into Court to the credit of the suit and therefore the question of wilful default does not arise at all; that even according to the plaintiff, he had issued a legal notice to the defendant on 7.3.1981 terminating the tenancy and this means that this defendant cannot be treated as a tenant and therefore the effect of termination is that the suit can only be for possession and in view of this termination of tenancy, the Court fees paid by the plaintiff is not correct and the court fee has to be paid on the market value of the building; that the present suit has been filed only to harass the defendant; that originally the rent was Rs.50/= per month and whenever a new President of the community is elected, the plaintiff either increases the rent or cause for a cash deposit without interest or for the increased deposit and thus the rent was increased from Rs.50/= to RS.65/= and with the next President, the defendant was compelled to deposit Rs.750/= with free of interest and when a new President was elected in the year 1979, the rent was raised to RS.98/= p.m. from 1.1.1980 and since this defendant and one Ramalinga Raja, who was a tenant in respect of shop bearing Door no.382 did not consent, the plaintiff refused to receive the rent and hence the defendant is regularly depositing the rent into Court. On such grounds, the defendant would pray to dismiss the above suit with costs.

7. Based on the above pleadings, the trial Court would frame the following issues for determination of the said suit:
1.Whether the suit is not maintainable as pleaded in the written statement?
2.Whether the suit suffers from not issuing the notice under Section 106 of the Transfer of Property Act?
3.Whether the suit suffers from not praying for proper reliefs?
4.Whether proper Court fee has been paid?
5.Whether the plaintiff is entitled to the relief of eviction as prayed for?
6.To what relief?

8. Thereupon, the trial Court would conduct a joint trial along with

the suit filed against another tenant of the plaintiff viz. Ramalinga Raja wherein on behalf of the plaintiff, one Radhakrishnan was examined for oral evidence as P.W.1 and would mark eight documents for documentary evidence as Exs.A.1 to A.8. On the contrary, on behalf of the defendants in both the suits, the deceased appellant herein was examined as D.W.1 for oral evidence and would mark four documents for documentary evidence as Exs.B.1 to B.4. In consideration of the said oral and documentary evidence placed on record, the trial Court would ultimately dismiss both the suits with costs. Aggrieved against the dismissal of the suit filed against the present deceased appellant, the respondent/plaintiff has preferred an appeal in A.S.No.27 of 1989 before the Court of Subordinate Judge, Srivilliputtur and the said Court having framed a point viz. `whether the Court below is right in dismissing both the suits filed by the plaintiff', and having its own discussions on the subject, has ultimately allowed the appeal filed by the plaintiff thereby reversing the findings of the trial Court. It is only aggrieved against the said judgment of the first appellate Court, the defendant before the trial Court has come forward to prefer the above second appeal on certain grounds as brought forth in the grounds of appeal and this Court has admitted the same for determination of the following substantial questions of law:

"1.Whether the suit is competent, without issuance of notice under Section 106 of the Transfer of Property Act terminating the contractual tenancy when the Rent Control proceedings came to an end by the respondent being permitted to withdraw the petition with liberty to file fresh petition.?

2.Whether the respondent could maintain the suits when the appellate authority granted permission to withdraw with liberty to file only a fresh petition, when the respondent itself did not ask for the liberty to file a fresh suit?"

9. During arguments, the learned counsel appearing on behalf of the appellant, having discussed the case of the appellant on facts and circumstances as projected before the lower Courts and the manner in which the trial Court and the first appellate Court as well, appreciated the evidence placed on record in a crisp manner stating that the defendant is the appellant and the tenant of the suit property; that the suit has been filed for recovery of possession by the 'Samuga Pothu Nala Fund' of a particular community of Rajapalayam represented by its President; that the plaintiff filed a RCOP for ejectment of this defendant and the same had been dismissed and on preferring the appeal, during the pendency of the appeal, he filed an Interlocutory Application seeking permission of the Court to withdraw the appeal and the said Court having permitted the appellant to do so with liberty to file a rent control petition, the above suit has been filed in O.S. No.43 of 1985 wherein the prayer is to order eviction of the defendant from the plaint schedule premises and to deliver possession of it to the plaintiff on ground that the suit schedule property is required for the plaintiff's own use and occupation and the said suit had been dismissed on all grounds with costs on a full trial held by the Court, one of which is that the suit is barred by the principles of res judicata; that there is absolutely no reason on the part of the first appellate Court to interfere with the judgment and decree of the trial Court in dismissing the suit with costs of the defendant nor has the appellate Court has dealt with the subject in the manner that it is required under law. At

this juncture, the learned counsel for the appellant would cite a judgment delivered in S.A.APPAL RAJA vs. THE COMMON FUND OF SENGUNTHA MUDALIAR COMMUNITY OF POOPALRAJAPETTI RAJAPALAYAM THROUGH ITS PRESIDENT, S.A.THANGAVEL reported in 95-L.W.156 wherein a learned single judge of this Court, in a similar petition filed under the Tamil Nadu Buildings (Lease and Rent Control) Act for eviction of the tenant, has held:

"The eviction petition filed by the Society is not competent, since the building to which it relates was clearly exempted from the provisions of the Act .... The tenant is therefore justified in raising an objection to the maintainability of the eviction petition on the ground that the building in which he is a tenant is wholly exempted from all the provisions of the Act. It follows that the order of eviction passed by the appellate authority in appeal, acting on the tacit assumption that the petition was maintainable, is bad in law."

10. Citing the above judgment, the learned counsel would submit that pursuant to the said judgment, the respondent/plaintiff withdrew the Rent Control proceedings with a liberty to file the fresh petition and liberty was granted to the respondent/plaintiff only to file a fresh petition but the plaintiff filed the present suit and the lower appellate Court has completely misconceived in allowing the appeal. On such arguments, the learned counsel for the appellant would pray to set aside the judgment and decree of the first appellate Court and to restore the trial Court's judgment.

11. On the other hand, the learned counsel appearing on behalf of the respondent would apprise this Court that notice under Section 106 of the Transfer of Property Act has been issued in the year 1981 itself in Ex.A.2 for which the reply has also been sent by the defendant in Ex.A.3 dated 2.4.1981; that the respondent is a Society registered under the Societies Registration Act; that the property is required for public purpose and that testifying the legality, the appellate Court has arrived at the right conclusion not only to set aside the judgment and decree passed by the trial Court as erroneous but also allowed the appeal decreeing the suit as prayed for and therefore no interference of this Court is required into the same. On such arguments, the learned counsel for the respondent would pray for dismissing the above second appeal.

12. On a careful perusal of the judgment and decree passed by the trial Court and the first appellate Court, it would be known that the trial Court, not only having traced the facts and circumstances of the case as projected by parties but also having framed proper issues and allowing the parties to record evidence and in appreciation of the same would ultimately arrive at the conclusion to dismiss the suit on all counts with costs. But, on the contrary, the appellate Court besides having dealt with the subject factually would also deal with such questions raised on the part of the defendant/tenant such as that there has been no proper notice under Section 106 of the Transfer of Property Act; that the suit was not properly framed for the purpose of court fees and jurisdiction and that the suit is barred by res judicata. All these vital questions having been decided in favour of the defendant by the trial Court, the first appellate Court having framed only one point 'whether it is proper on the part of the Court to set aside the judgment and decree passed by the trial Court', has unnecessarily gone into the rent

control proceedings in length for pages together and has also gone into the question of termination of tenancy with or without notice of termination through the judgments decided without properly dissecting these questions on facts and circumstances pleaded and proved on the floor of the Court and would justify the notice issued in Ex.A.2 prior to commencing the RCOP proceeding to be the proper notice contemplated by law for the suit also. But, the vital point for consideration is 'whether the notice which has been issued for seeking the eviction under the relevant provisions of the TNBLRC Act could be

taken as the proper notice for the purpose of the suit also much less as warranted under Section 106 of the Transfer of Property Act, which is mandatory in cases of such nature seeking eviction?'

13. So far as the notice of termination issued under Ex.A.2 is concerned, it has been issued for the purpose of the proceeding to be initiated for eviction of the tenant in accordance with the Tamil Nadu Buildings (Lease and Rent Control) Act and besides such a notice is not mandatory so far as the said Act is concerned and ultimately the very proceeding initiated for eviction of the tenant under the TNBLRC Act also having been withdrawn thus allowing the RCA for the limited purpose of dismissing the RCOP, which had been originally dismissed declining to grant any prayer on any of those grounds the eviction was sought for, the argument of the plaintiff Sangham that the same notice of eviction has been again filed in the suit for evicting the tenant, the appellant herein, and deciding that it is a proper notice that is contemplated under Section 106 of the Transfer of Property Act, does not seem to be the right approach of things since seeking eviction of the tenant under the TNBLRC Act is a completely different proceeding from seeking eviction of the tenant filing a suit. Therefore, this Court is of the view that once the proceeding initiated under the TNBLRC Act goes, all such steps taken towards instituting the eviction proceedings also would go including the notice issued in the year 1 981 under Ex.A.2 and therefore when the plaintiff contemplates to initiate a fresh proceeding under the relevant provisions of the CPC filing a suit for eviction of the tenant, the specific notice as contemplated under Section 106 of the Transfer of Property Act is a must and only in such event, the other side i.e. the tenant would be in a position to get ready within such time contemplated by law either for eviction acting in consonance with the notice or for opposing the same.

14. The plaintiff cannot presume himself that the earlier notice issued for the earlier proceeding would be taken for granted as a notice contemplated under Section 106 of the Transfer of Property Act for the filing of the suit for eviction of the tenant, which cannot be the proper approach particularly in matters of eviction and unless a specific notice as it is contemplated under Section 106 of the Transfer of Property Act is issued, no suit could be filed for eviction of the tenant and hence this point forming part of the first substantial question of law has to be answered in favour of the appellant laying emphasis that without issuance of the notice under Section 106 of the Transfer of Property Act, termination of the contractual tenancy is impossible irrespective of the earlier proceeding initiated which

is allowed to be withdrawn. Therefore, it cannot be misconstrued that once liberty is given to withdraw the proceeding initiated under the TNBLRC Act, it is the licence granted to justify every non-compliance of the legalities required under law thus deciding this substantial question of law against the plaintiff and in favour of the appellant/ defendant.

15. It is relevant to mention that the first appellate Court has arrived at erroneous conclusion justifying the act of the plaintiff and concluding that the notice earlier issued prior to commencement of the RCOP proceeding in accordance with the TNBLRC Act would also stand good for the subsequent suit proceeding and hence at this score itself, the judgment of the first appellate Court becomes liable to be set aside.

16. Coming to the second substantial question of law, it is only technical to the effect 'whether the suit could be maintained when liberty was given only to file a fresh petition while withdrawing the RCOP proceeding', we could understand that though the term employed there is the 'petition', it would only show the carelessness of either the petitioner in his prayer or in the order passed by the Rent Control Appellate Authority in terming the fresh proceeding as a petition since in all fairness, in pith and marrow of the substance, it was the suit that was designed by party to be initiated and not any other petition in vogue and therefore this substantial question of law is decided as unnecessary and unwarranted deciding that it was only the suit that

was meant and because of terming the same to be the petition, no damage has occurred to the institution of the suit and maintaining the same and hence this substantial question of law is decided accordingly.

17. The other question such as res judicata cannot come into play since the earlier proceeding initiated by the same plaintiff for one and the same relief under the relevant provisions of the TNBLRC Act has been found not in tune with the legal provisions as per the judgment of this Court reported in 95-L.W.-156 (cited supra). When the plaintiff prayed for withdrawing the same, the Court had rightly permitted the plaintiff not only to withdraw the said proceeding but also to institute a fresh proceeding under different laws on the same cause of action. Therefore, the question of res judicata cannot arise at all. However, this Court hastens to add that since the other side requires sufficient time and opportunity either to comply with or to oppose the move of filing the suit for eviction, the notice as contemplated under Section 106 of the Transfer of Property Act is a must and since the same has not been issued, at this score itself, the judgment and decree passed by the appellate Court becomes liable to be set aside and the same is decided accordingly as unnecessary adn unwarranted.

In result,
(i)the above second appeal succeeds and the same is allowed.
(ii)The judgment and decree dated 20.8.1991 rendered in A.S.No.27 of 1989 by the Court of Subordinate Judge, Srivilliputtur is hereby set aside.
(iii)The judgment and decree dated 7.4.1989 rendered in O.S.No.43 of 1985 by the Court of Additional District Munsif, Srivilliputtur is hereby restored.

However, in the circumstances of the case, there shall be no order as to costs.

Index: Yes
Internet: Yes

Rao

To

1.The Subordinate Judge,
Srivilliputtur.

2.The Additional District Munsif,
Srivilliputtur.